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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 584

SEABOARD AIR LINE RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed on the ground that the appeal presents no substantial question warranting further argument.

STATEMENT

This is a direct appeal from a final judgment, entered on November 10, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint which sought to set aside an order of the Interstate Commerce Commission. The Commission's order required the appellant railroad to join the Atlantic Coast Line Railroad Company ("Coast Line") in providing for the interchange at Jacksonville, Florida, of all traffic from or to points on appellant's line south of Jacksonville, on the one hand, and points on the lines of the Coast Line running from Waycross, Georgia, to Atlanta, Georgia, Birmingham, Alabama, and points beyond, on the other hand, at the joint rates and divisions presently in effect for such traffic when interchanged at Thalmann, Georgia.

Appellant's line from southern Florida points runs through Baldwin, Florida, to Savannah, Georgia, and points further north. There is a junction at Baldwin with its line from Jacksonville to Columbus, Georgia, and Montgomery, Alabama, at which points there are connecting rail lines running to Birmingham. Southern Florida-Birmingham traffic can move over this route. Southern Florida-Atlanta traffic can move over appellant's line to Savannah, then over its Savannah-Macon line,[1] and then over connecting lines

[1] Part of this line (from Vidalia to Macon) is that of a wholly owned subsidiary.

running from Macon, Georgia, to Atlanta. See Appendix C.[2]

The Coast Line has a main line running from Jacksonville to Atlanta and, via a prong, to Birmingham. The Coast Line also has a line from Brunswick, Georgia, which connects with its Jacksonville-Atlanta-Birmingham line at Waycross, Georgia, and a line from Anguilla (near Brunswick) connecting with the main Jacksonville-Atlanta-Birmingham line at a point a relatively short distance from Waycross and connecting with appellant's line to Savannah at Thalmann. See Appendix C.

Appellant and the Coast Line have long been parties to joint rates on traffic between southern Florida points on appellant's line and Atlanta, Birmingham, and points beyond these gateways, with interchange made at Thalmann. The present proceeding was brought to assure continuance of these through routes following the Coast Line's abandonment of its line running west from Anguilla. Such abandonment was authorized by the Commission in December 1950 upon a showing that this was a secondary line badly in need of rehabilitation, that continuance of service would involve substantial annual operating losses, that a rail lying to the north and another to the south made it an unnecessary duplication of railroad

[2] The words "Appendix C" refer to Appendix C of appellant's jurisdictional statement. We will similarly refer to other parts of this appendix under the designations there given, e.g., Appendix A-1, Appendix A-5. A citation such as Appendix A-1,3 refers to page 3 of Appendix A-1.

facilities, that truck transportation could serve local needs, and that there were equal or better alternative routes for the through traffic which was interchanged with appellant at Thalmann. See Appendix A-5, 2-4, 6-7, 19.

Appellant and the Coast Line were unable to agree upon the interchange point to be substituted for Thalmann, and in August 1951 the Coast Line filed a complaint asking that appellant be required to interchange at Jacksonville the through interline traffic currently interchanged at Thalmann, at the joint rates and divisions applicable via Thalmann. After full administrative hearings, Division 3 of the Commission issued a report in which it found that interchange at Jacksonville would provide more expeditious service (particularly important in the case of citrus fruit traffic), than would interchange at Bladen (on the Coast Line's Brunswick-Waycross line) as proposed by appellant. No order was entered pending appellant's implementation of the Commission's conclusions within a reasonable time. See Appendix A-4, 4-6, 10.

On appellant's petition the Commission reopened the matter for further hearing and the taking of additional evidence. Thereafter, Division 3 issued a report dealing at length with the pertinent facts and considerations (Appendix A-7, 1-28). With particular reference to the short-hauling prohibitions of Section 15(4) of the Interstate Commerce Act, the Commission affirmed its prior finding that exception (b) of the section

is applicable "since the proposed route through Jacksonville is clearly needed in order to provide adequate, and more efficient and more economic, transportation" (*idem* 28). The order of the Commission giving effect to the findings made in its second report was unanimously affirmed by the three-judge district court in an opinion by Circuit Judge Dobie (Appendix A-1).

ARGUMENT

The Commission's order directing appellant to make provision for the interchange of certain traffic at Jacksonville is partly grounded on Section 3(4) of the Act, which requires all railroads subject to the Act to afford "all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines." The Commission found that this section obligated appellant to provide interchange facilities "at an interchange point in lieu of Thalmann." and that this obligation "can be met only by using Jacksonville as the interchange point" (Appendix A-7, 28).

The Commission, in addition to substituting Jacksonville for Thalmann as the interchange point for certain traffic, directed that "the joint rates and divisions presently in effect via Thalmann" shall apply to this traffic. This aspect of the order is directly within the Commission's power, under Section 15(3) of the Act, to establish joint rates and divisions thereof whenever it deems this to be "necessary or desirable in the public interest."

Appellant attacks the Commission's order upon

the ground that it requires appellant to establish a through route under which it would be short hauled, contrary to the prohibitions of Section 15(4). The issues thereby raised—decided adversely to appellant by both the Commission and the district court—are (1) whether the Commission established a new through route and, if so, (2) whether the Commission made findings, having adequate evidentiary support, that the case comes within one or both of the exceptions to the Section 15(4) prohibition.

1. Concededly, there has long been in existence a through route over the lines of appellant and the Coast Line for traffic moving between southern Florida points on appellant's line and the Atlanta and Birmingham gateways and points beyond. Where a through route already is in existence, exercise by the Commission of its statutory powers under other sections of the Interstate Commerce Act is not subject to the limitations or prohibitions of Section 15(4). *United States* v. *Great Northern Railway Co.*, 343 U. S. 562.

In the *Great Northern* case, this Court held that, where through service exists, the Commission's prescription of joint rates and divisions thereof, in lieu of pre-existing combination rates, did not constitute establishment of a new through route, and "Section 15(4) does not affect the Commission's power." We submit that, *a fortiori*, the order in the instant case is not the establishment of a new through route. A Commission order which, as here, merely prescribes a new interchange point for an existing

through route, preserving for each party to the route the existing joint rates and divisions thereof, clearly effects a less drastic change than substituting for separately-established combination rates Commission-prescribed joint rates and divisions thereof.

The district court, in holding that the Commission's order does not establish a new "through route" in the statutory sense, observed that, under the order, the "requisite and vitally important components of the original through route * * * will still be intact" (Appendix A-1, 8-9). The court pointed out that "the origin and destination territories and the freight rates and divisions remain the same"; that the participating carriers remain the same; that the traffic involved, being through overhead traffic, will "not be affected by the shift of the interchange point"; that no intermediate traffic will be affected; and that all that is involved is "simply a readjustment of the interchange facilities for the continued operation of an established joint interline service" (*idem* 9).

2. But assuming, *arguendo*, that the Commission's order does establish a new "through route" and that Section 15(4) is therefore applicable, its order must be sustained because, as the court below stated, "the Commission made findings, based on substantial evidence, which permit the establishment of a new 'through route' under clauses (a) and (b) of Section 15(4)" (Appendix A-1, 10).

Section 15(4) provides that the Commission, in establishing a through route, shall not require a

rail carrier, without its consent, to embrace in such route substantially less than the entire length of its railroad lying between the termini of the proposed through route—

> (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: * * *.

Since the Commission made the finding of clause (b) in *haec verba*,[3] the only issue open in this connection is whether the finding has evidentiary support. Under clause (b), the interest both of the shipping public and of the carriers involved "should be considered and a fair balance found". *Pennsylvania Railroad Co.* v. *United States*, 323 U. S. 588, 593. The reports of the Commission in the present case show that it had before it and considered abundant evidence bearing upon the advantage to shippers of the through route through Jacksonville, and of the operating problems and carrier costs incident to use of this interchange point. Without reviewing the evidence in detail, we call attention to the following evidence reflected in the Commission's reports:

Evidence as to the volume and character of the traffic moving over the through route via Thalmann

[3] The finding is quoted *supra*, p. 5.

(Appendix A-4, 6; Appendix A-7, 16-17); evidence that the nature of the terrain and building conformation permit maintenance of higher speed on the line of the Coast Line from Jacksonville than on its line from Brunswick (Appendix A-7, 9); evidence that its traffic from Jacksonville moves on fast freight trains over double-track lines and does not require classification or switching at intermediate junctions (*idem* 11); evidence showing for an 8-day period actual times of arrival at Baldwin (18 miles from Jacksonville) of appellant's freight trains from the south, with the number of carloads of perishables carried in each train (*idem* 29); the view expressed by a witness for the intervenor (a wholly-owned subsidiary of appellant) that the Jacksonville route would be faster than over appellant's line through Vidalia and Macon (*idem* 5); and evidence as to appellant's possible additional cost with interchange at Jacksonville, as against which there would be its cost saving in having a 54-mile shorter haul than with the present interchange at Thalmann (Appendix A-4, 5).

We submit, therefore, that the Commission's finding that the route through Jacksonville "would be substantially superior to routes presently in use" for the traffic in question (Appendix A-7, 27-28) has ample support in the evidence.

As to clause (a), the Commission found that appellant's line between southern Florida and Atlanta and Birmingham is "unreasonably long as compared with the Seaboard-Coast Line route with interchange at Jacksonville" (Appendix A-7, 27).

Since Section 15(4) is not applicable if the case comes under *either* clause (a) *or* clause (b), the question of whether the clause (a) finding has evidentiary support would not appear to be of much moment. The district court said of this finding that "the most convincing evidence, though there was other testimony," in support of the finding "is a glance at the maps showing" the various routes to Atlanta and Birmingham (Appendix A-1, 11). We also note that appellant concedes that its route to Atlanta via Savannah, Vidalia, and Macon is longer than the Coast Line route thereto (Juris. Statement 13).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct, and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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MARCH, 1955.

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ATLANTIC COAST LINE RAILROAD COMPANY,
Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF OPPOSING MOTIONS TO AFFIRM.

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March 29, 1955.

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BRIEF OPPOSING MOTIONS TO AFFIRM.

Pursuant to Rule 16, paragraph 3 of the Revised Rules of this Court, the appellant files this brief in opposition to the separate motions to affirm made by (a) the United States of America and Interstate Commerce Commission, and (b) Atlantic Coast Line Railroad Company.

Preliminary Statement.

Both motions to affirm are made pursuant to Rule 16, paragraph 1(c), in which Rule it is stated that this Court will receive a motion to affirm the judgment sought to be

reviewed on appeal from a federal court, "on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." We respectfully submit that the questions presented are not unsubstantial, but are of public interest and importance.

At the outset, however, we must point out certain statements in both motions which we believe to be incorrect or misleading, and which we cannot permit to stand unchallenged as they have a direct bearing upon the substance of the appeal. By pointing out certain statements we do not, of course, concede the accuracy of all other statements in those motions.

(a) With respect to the Coast Line's Motion.

We take immediate issue with the following statement on page 6 of the Coast Line's motion:

> "This case involves nothing more than a simple dispute between two rail carriers over the substitution of one interchange point for another interchange point on a joint through interline service which has been maintained by these carriers for many years."

That statement assumes that the Seaboard is willing to continue a route with the Coast Line for the traffic in question. That assumption is incorrect. The Seaboard is not willing to continue any route with the Coast Line for the traffic in question, once the Coast Line has exercised its abandonment authority, and it is wholly incorrect to say that the case involves nothing more than the substitution of one interchange point for another interchange point.

The Seaboard has unequivocally stated that it will not agree to any substitute interchange point for the traffic in question and that it will be perfectly satisfied if the

Coast Line closes the route through Thalmann by abandoning the line from Alma to Anguilla. The record clearly shows that the Seaboard is not interested in any substitute interchange point.

The Seaboard's amended answer before the Interstate Commerce Commission, dated March 12, 1953, contains, among others, the following allegations:

> (par. 2) "Defendant denies that any dispute has arisen on its part with respect to the point of interchange of any traffic now being interchanged between it and complainant."
>
> (par. 3) "* * * *the defendant hereby withdraws any offer or agreement on its part to substitute Bladen or any other junction or interchange point in lieu of Thalmann,* unless and until the complainant has secured further and appropriate authority for the abandonment of the above mentioned portion of the old Atlanta, Birmingham and Coast Railroad. Defendant has and will have no objection to such abandonment provided conditions are imposed for its protection and that its present through routes, and those in connection with its subsidiary, the Macon, Dublin & Savannah Railroad Company, and its general competitive situation and that of its said subsidiary, are not adversely affected." (Emphasis supplied.)

With respect to the above quoted portion of paragraph 3 of its amended answer, Seaboard's brief before the Interstate Commerce Commission, dated May 11, 1953, stated (pp. 3 and 4):

> "The Seaboard has now withdrawn even the implication in paragraph 3 of the amended answer that, under some circumstances, it might agree to an alternate interchange point in lieu of Thalmann for the traffic involved in this proceeding. If the testimony is not sufficiently clear and specific on

that point (R. 851) *the Seaboard here and now, on brief, advises the Commission that it does not agree to the substitution of Bladen or any other junction or interchange point for the traffic hereinafter described.*" (Emphasis supplied.)

In a footnote to that statement the Seaboard pointed out that it was still willing to substitute Bladen as the interchange point for the so-called Brunswick traffic, as distinguished from the south Florida traffic involved in this case, but that "* * * the position stated with respect to the traffic involved is unequivocally the Seaboard's position so long as this proceeding is pending."

At the oral argument before Division 3 of the Commission, on December 16, 1953, the Seaboard's position was clearly stated, and we quote (Tr. 935-936):

"Mr. McDonough: * * * The point I have been making, the point I have been insisting upon, is that there is no through route for this particular traffic through Jacksonville or Callahan, at the present time. *And there is an effort to open a through route, on the guise of asking for a substitute interchange point.*

We are not asking to close the present open route. * * * Now, they are closing by abandoning the line.

Comm. Knudson: That has already been authorized by the Commission. That is water over the well-known dam, is it not?

Mr. McDonough: Except that they have not abandoned it.

Your Honor, it is up to them. *If they want to close the present route through Thalmann, we are perfectly satisfied. We are not asking for any substitute interchange point at all.*" (Emphasis supplied.)

The traffic in question is traffic originated by the Seaboard or terminated on the Seaboard. It is Seaboard traffic on which the Seaboard is entitled to its long haul, absent good reason to the contrary. The traffic in question that now moves through Thalmann can move equally as well over the Seaboard's long haul routes[1], and the mere fact that the Coast Line proposes to abandon its line through Thalmann furnishes no reason, no proper excuse, nor any necessity for any substitute interchange point. No shipper will be affected or harmed if that route is closed, for the traffic that now moves through Thalmann will move through the Seaboard's long haul routes at the same rates and with the same service to and from the same origins and destinations.

We take like issue with the portion of the following statement appearing on page 4 of the Coast Line's motion which we have italicized:

> "Thalmann is located on the segment of track authorized to be abandoned and *the exercise of the abandonment authority necessitates the substitution of another interchange point* in lieu of Thalmann on the traffic interchanged at Thalmann."

In the first place, the abandonment authority has not been exercised and, in the second place, even if it should be exercised there is no necessity for any substitute interchange point. The Coast Line produced no shipper witnesses to testify they would be hurt by closing the route.

The Seaboard's evidence was positive to the contrary. The witness R. T. Etheridge, an Assistant Vice President

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[1] The reference here and throughout this brief to the Seaboard's long-haul routes is to its routes through Montgomery, Columbus and Macon-Vidalia (See the map, Appendix C to the Jurisdictional Statement). The facts that Seaboard's north and south line to Richmond runs through Hamlet, and that Seaboard has a line of railroad running southwest from Hamlet to Atlanta and Birmingham, have nothing to do with this case. The traffic involved in this case does not move through Hamlet.

of the Seaboard, testified, among other things (Tr. 848-849):

> "There have been no complaints, except in isolated and specific cases common to all lines, of the service via our longer-haul junctions, and we can continue to perform quite well without the Thalmann interchange, with more profit to the Seaboard and with no impairment of service to the public."

The Commission itself found that the Seaboard's long haul routes for its own traffic were "presumably" satisfactory (Jurisdictional Statement, p. 12, and Appendix A-7, p. 24), and the Court below found that the instant case (Jurisdictional Statement, p. 18, and Appendix A-1, p. 12), "involves no shipper complaints."

We take like exception to the following statement on page 7 of the Coast Line's motion:

> "We are here dealing with a through interline service which has been in effect between Seaboard and Coast Line for many years."

The challenged order of the Commission would establish a "through interline service" via Jacksonville, at joint rates, and this case is dealing with an order purporting to require the establishment of such service via Jacksonville. It is not correct to say that such through interline service via Jacksonville has been in effect between Seaboard and Coast Line for many years. The contrary is the truth. For the traffic in question there has never been such through interline service in effect between Seaboard and Coast Line, via Jacksonville.

The Seaboard and the Coast Line have had in effect for many years agreements specifically providing that neither line would accept the traffic in question at either Callahan or Jacksonville (except in switching service). Those agree-

ments are contained in the routing instructions issued by the two railroads which were introduced in evidence before the Commission as Exhibits Nos. 45 and 46.

Prior to the commencement of the Coast Line's abandonment proceeding the Seaboard advised the Coast Line, "that we would not consider opening a route via Jacksonville either in lieu of or in addition to the route via Thalmann." (File memorandum of Mr. G. B. Rice, Vice President of the Seaboard, dated February 28, 1948, Exhibit No. 73 (Tr. 850)). The Seaboard's position in that respect has not changed.

The facts are that under Section 15(8) of the Act the Seaboard would not have been required to accept a car for movement on a through bill of lading routed through Jacksonville, but could insist upon local billing. If the law were otherwise, the act of a shipper in tendering a through bill of lading could open up a new route through Jacksonville or anywhere he chose, and the result condemned by this Court in the *Thompson* case (*Thompson* v. *United States*, 343 U. S. 549 (June 2, 1952)) would have been reached.

There is no dispute between the two railroads over the substitution of an interchange point. The Seaboard has no interest in the continuation or substitution of an interchange point, and it has no desire to have the Coast Line continue to participate in the handling of this Seaboard traffic. The Coast Line is in the position that it cannot have both the benefits of the abandonment, and the benefits of continued participation in the handling of Seaboard traffic, unless the order of the Commission opening a new route for the latter purpose is sustained by this Court.

The Coast Line told the Commission in the abandonment proceeding that the abandonment would effect savings of $184,000 per year (Appendix A-5, pps. 8 and 16). The

Coast Line has now foregone estimated savings in excess of $750,000 in its efforts to have the benefits of continued participation in the Seaboard's south Florida traffic.

(b) With respect to the motion of the United States and the Interstate Commerce Commission.

We also take exception to the oversimplification in the following statement in the motion of the United States and the Commission, appearing on page 6 thereof:

> "Concededly, there has long been in existence a through route over the lines of appellant and the Coast Line for traffic moving between southern Florida points on appellant's line and the Atlanta and Birmingham gateways and points beyond."

That statement is misleading and inaccurate unless the words, "with interchange at Thalmann," are added.[2] There is not now and has never been in existence a "through route" via Jacksonville, or any other point of physical connection through which such traffic could be moved in conjunction with the Coast Line, except the still open route through Thalmann.

On cross-examination by counsel for the Coast Line, the Seaboard's witness Etheridge, testified (Tr. 851):

> "Q. [By Mr. Gwathmey] just one other question, then, Mr. Etheridge:

---

[2] The Court below added the necessary qualification saying (Appendix A-1, p. 8):

> "In the instant case, through transportation service between Coast Line and Seaboard has been in existence for a number of years between the points involved in the Commission's order, *via Thalmann*." (Emphasis supplied.)

but the Court below used that statement as the basis for its conclusion that the existence of a through route via Thalmann presupposed the existence of a through route via Jacksonville, which we submit is contrary to the holding of this Court in *Thompson* v. *United States*, 343 U. S. 549 (June 2, 1952).

> Is there any other route on traffic from Seaboard points, prior to their serving Jacksonville, via the Coast Line to the destination territory involved in this proceeding, by which I mean traffic moving Birmingham, Atlanta, and points beyond, is there any other route between Coast Line and Seaboard? A. I know of no other route between South Florida on the one hand and points beyond Atlanta and Birmingham on the other, [except] by Thalmann.
>
> Q. If that route is eliminated there will be no joint Seaboard-Coast Line route from this territory to the other territory? A. That is correct; * * *."

The report of the Commission (Appendix A-7) will be searched in vain for any explicit statement or finding that there is an established through route via Jacksonville for the traffic in question. If the Commission so intended to find, the finding can only be spelled out by inference, deduction, adumbration, and halting impression, which are not sufficient to support the Commission's orders, particularly in view of the direct and uncontradicted evidence to the contrary (*Secretary of Agriculture* v. *United States*, 347 U. S. 645 (June 7, 1954), and *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499 (March 4, 1935)).

At the oral argument before Division 3 of the Commission, on December 16, 1953, counsel for the Coast Line conceded that (Tr. 966) "* * * the tariffs today do not provide for this is [as] an open, active route through Jacksonville."

The following excerpts from the oral argument before Division 3 are important (Tr. 931-932):

> "Comm. Knudson: What do the published tariffs show? Do they show an open route through Jacksonville?
>
> "Mr. McDonough: For their [this] traffic, no.
>
> "Comm. Knudson: Well, what kind of traffic do they show open routes for?

"Mr. McDonough: Oh, there is much traffic interchanged at Jacksonville. But not this traffic, not this traffic from south Florida, and Atlanta and Birmingham and beyond."

* * * * * *

"Comm. Knudson: Mr. Gwathmey, you have three minutes on rebuttal. Will you kindly refer, if you find it possible to do that, to that part of the record which, in your opinion, establishes a proof of record of an existing route through Jacksonville" (Tr. 964).

* * * * * *

"Mr. Gwathmey: * * * As to the question of through routes, I think that Mr. McDonough is right in saying that the tariffs today do not provide for this is [as] an open, active route through Jacksonville.

"I do not see how they can deny, if traffic is routed through that junction, how it could be rejected.

"It would move through on combination rates, and they would have to accept it. And as he points out, there has been a number of cars which moved through there. But regardless of whether you find technically or not——

"Comm. Knudson: On combination rates, there would have to be a physical interchange of cars?

"Mr. Gwathmey: Absolutely, and you have it. You have your physical interchange and the facts of interchange, plainly" (Tr. 966).

The Court below did not even mention that argument, much less base its opinion upon it, and neither did the Commission. As pointed out above, the argument is without foundation. The important thing here is that it is an entirely different matter for the appellee and the intervenors to argue *to the Commission* that through routes exist because there is physical connection and that traffic could move on combination rates, than it is for them to

assume one of the important questions in the case by stating to this Court in their motion papers, in effect, that there has for many years been through interline service, *via Jacksonville.* That latter statement is not correct, and was not so found either by the Commission or the Court below.

The *Commission* did not find that there is an established through route via Jacksonville, even though counsel for the Coast Line so argued to the Commission. The *Court below* did not find that there was an established through route via Jacksonville, but instead reasoned that because traffic moved, say, from Winter Haven, Florida to Minneapolis, Minnesota, the existence of a route *via Thalmann* presupposed the existence of a route via Jacksonville, and that in ordering a through route at joint rates via Jacksonville the Commission was not opening a *new* through route.

The Questions are Substantial and of Public Importance.

The test adopted by the Court below for determining that a new through route was not opened is a matter of national consequence. The Court below said (Appendix A-1, p. 8):

> "It seems clear, in keeping with the definition of a through route cited in the Thompson case, *supra,* i. e., 'A continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another,' that no new 'through route' has been established. The essential features of the old through route still prevail. There has been a change only in a minor detail, namely, the substitution of Jacksonville as the interchange point in place of Thalmann."

The junction at which the traffic is to be interchanged is not a minor detail but is the vital fact to a railroad looking to protection under Sections 15(3) and (4) of the Act.

The fallacy of the test adopted by the Court below can be illustrated by a glance at the map, Appendix C to the Jurisdictional Statement. The Seaboard has a similar route for the traffic in question in conjunction with the Southern Railway Company, via Everett. If the test applied by the Court below is correct, it must follow that the Commission could order the Seaboard to interchange the same traffic with the Southern at Jacksonville, in lieu of Everett, without thereby opening a new route. All that would be involved, according to the Court below, would be a change in a minor detail!

The gross freight revenues received by the Seaboard from traffic (including the traffic in question) moving through the Montgomery, Vidalia and Columbus gateways, for the year 1952, amounted to $28,351,000 (Exhibit No. 43). For the same year, the Seaboard's freight revenues for the entire system amounted to $133,260,000 (Tr. 578). In other words, approximately 21% of the Seaboard's entire freight revenues came from the movement of traffic through those three principal gateways. The record does not contain a detailed breakdown of the revenue from the south Florida traffic in question that moved through those gateways, but it was estimated at not less than $12,000,000 per year (Tr. 579).

The record shows that the Seaboard has spent millions of dollars for equipment and roadway betterments on its long-haul routes in reliance upon the heavy and increasing volume of the traffic in question moving over those routes (Tr. 611). If the test adopted by the Court below is correct, any protection thought to be afforded by Sections 15(3) and 15(4) in illusory. The test used by the Court below, if

applied to the railroad systems of this Country, would jeopardize enormous investments made in the belief that the railroads were entitled to retain their long-haul routes, and that they could not be deprived of the same, nor be forced to open new routes at the same joint rates in direct competition with their long-haul routes, except in cases where the Commission met the requirements of Sections 15(3) and 15(4).

The Court below, as did the Commission, simply ignored the fact that the Seabord has its own long-haul routes over which its south Florida traffic moves in large volume without the intervention of the Coast Line for any part of the way. The Court below continued (Appendix A-1, pp. 8-9):

> "In essence, the requisite and vitally important components of the original through route under the new arrangement will still be intact—the holding out by the carriers involved and the actual transportation of traffic at a through rate from and to the same origin and destination points described in the Commission's order. Thus, the origin and destination, territories and the freight rates and divisions remain the same regardless of the junction at which the traffic is to be interchanged."

The opinion of the Court below concedes that the Commission's order would establish a "new point of interchange", and a "new arrangement" but it found that (Appendix A-1, p. 9), "Technically, what is involved here is not the establishment of a new 'through route' in the statutory sense." The Court below simply disregarded the fact that there has never been any "holding out" by the Seaboard and the Coast Line to transport the Seaboard's south Florida traffic at a joint or through rate *via Jacksonville*, and the Court below committed plain error in assuming that the existence of a through route via Thalmann

presupposed the existence of a through route via Jacksonville.

In stating that the divisions would remain the same the Court below apparently was confusing divisions with revenue and simply disregarded or overlooked the fact that once a new route is opened via Jacksonville no power on earth can limit the traffic that might thereafter move through Jacksonville to the small amount of traffic that heretofore moved through Thalmann.

The Court below may have been influenced by the wholly erroneous statement of the Commission (Appendix A-7, p. 26), that, "* * * there is no indication that the revenue earned when traffic moves via the other junctions is greater than would accrue to the Seaboard on the same traffic interchanged at Jacksonville." We are at a loss to understand how that statement could have been made. The testimony to the contrary was positive and uncontradicted.[3]

In 1952 a total of 75,405 cars of the traffic in question moved through the four gateways of Montgomery, Columbus, Vidalia, and Thalmann. Out of those 75,405 cars, only 1,743 moved through Thalmann while 73,662 moved through the Seaboard's longer haul gateways. The Commission's order would not close those other gateways, nor compel the traffic to move via Jacksonville, but that is beside the point.

The Commission and the Court below have attempted to do precisely what this Court said should not be done, in the case of *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269, (January 2, 1929), hereinafter for convenience referred to as the *Subiaco* case. In that case the Missouri Pacific's

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[3] Seaboard's witness J. A. Kane, Assistant General Freight Agent (Tr. 563):

> "Every car of that traffic that moves via a new route through Jacksonville or Callahan, instead of Montgomery or those other gateways, means a direct loss of revenue to the Seaboard."

existing long-haul routes were not closed, and the traffic there in question was not compelled to move over the Subiaco.

In the *Subiaco* case the traffic involved was traffic originating east of the Mississippi River and moving through Memphis, Tennessee, to Fort Smith, Arkansas, and points beyond. The order of the Commission in that case applied only to westbound traffic, but the analogy to southbound traffic in the instant case is precise. If the test of a through route was the continuous carriage of goods from a point east of the Mississippi River to Fort Smith, and points beyond, the Commission's order in the *Subiaco* case, requiring the same joint rates for traffic moving over the Subiaco, via Paris, Arkansas, in conjunction with the Missouri Pacific, would not have been the opening of a new through route.

This Court held to the contrary, and said (278 U. S. 269, at p. 276):

> "The order would compel the Missouri Pacific to use its Paris branch *to establish a route* to compete with those in which it has much longer hauls. *The new route* would give it a haul not more than the length of the Paris branch as against those over its lines from its Mississippi gateways to or beyond Fort Smith." (Emphasis supplied.)

In the instant case, on southbound traffic, the order would compel the Seaboard to use its line from Jacksonville to Baldwin to establish a route to compete with its own routes on which it has much longer hauls and greater revenue, through Montgomery, Columbus and Macon-Vidalia. There would be the same result with respect to northbound traffic. If the Court below is correct, that is all immaterial because the origin and destination territories and the freight rates would remain the same via the new short haul junction.

Neither the report of the Commission nor the opinion of the Court below adopted the argument of counsel for the Coast Line that there was already in existence a through route via Jacksonville because the traffic in question could move via Jacksonville on combination rates, and it is our view that that question is not reached in this case.

That question was reached and is involved in litigation over the Commission's decision in *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611 (January 12, 1953). In an action brought in the District Court of the United States for the District of Nebraska, Omaha Division, that order of the Commission was set aside in part, by a divided court, with an opinion released October 22, 1954, the dissenting judge being of the opinion the order should have been set aside *in toto*.

In another action involving the same order of the Commission, brought in the District Court of the United States for the District of Colorado, with an opinion filed January 13, 1955, a unanimous Court did not strike down any part of that order, but held that the Commission did not go far enough in the relief granted. The basis of the Colorado court's decision was that the Commission had misconstrued the *Thompson* case in holding that certain routes were not through routes and that they had been closed as such by the application of higher combination rates. If this Court should be of the view that that question is presented in this case, it is a question equally as substantial and important as the unusual test adopted by the Court below in holding that the Commission's order in the instant case did not open a new through route.

If it be argued that the Commission's exercise of its abandonment authority gave it some power it would not otherwise possess with respect to opening a new route through Jacksonville (i.e., that it had the power in con-

junction with the Coast Line, but not with the Southern, although the situations are otherwise identical for all practical purposes), a grave question of statutory construction would be presented, and, if such was found to be the case, the concomitant would be that the Seaboard was a necessary party to the abandonment proceeding, and the abandonment authority being ineffective, the assumed necessity for a substitute interchange point does not exist. Among other things, the Seaboard might have protected itself in that proceeding in a number of ways, even to the extent of requesting a condition that would have permitted it to acquire and operate the portion of the line between Thalmann and Sessoms.

We deem it unnecessary to repeat or elaborate upon the showing made in the Jurisdictional Statement of the Commission's failure to meet the requirements of either clause (a) or clause (b) of Section 15(4), and of the error of the Court below in finding that the Commission had done so.

We respectfully submit that the questions presented by this appeal are substantial and of public importance, and that the motions to affirm should be denied.

March 29, 1955.

Respectfully submitted,

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